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No. 99-2067

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAUL MAY,

Petitioner,

v.

NORM HAND and YAMHILL COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Elected sheriffs in Oregon have statutory authority to appoint their own deputies, who then serve at the pleasure of the sheriff. After Norm Hand was elected Sheriff of Yamhill County, Sheriff Hand decided to reorganize the Sheriff's Office and eliminate certain high-level policymaking positions. Petitioner, who had run against Sheriff Hand in the election for Yamhill County Sheriff, held one of the positions that was eliminated.

1. Did the District Court and the Ninth Circuit properly conclude that the rules developed in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), govern the determination of whether a newly-elected Sheriff violates the First Amendment rights of certain subordinates when the Sheriff decides to change the structure of the Sheriff's Office and eliminate certain policymaking positions?

2. Does the fact that the Board of Commissioners approved the elected sheriff's decision to reorganize the Sheriff's Office, preclude application of the rules from *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to the decision made by a newly-elected Sheriff to change the structure of the Sheriff's Office and eliminate the certain policy-making positions?

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STATEMENT OF THE CASE

In November 1996, Petitioner Paul May ("Petitioner") was a Captain in the Sheriff's Office for Respondent Yamhill County, Oregon ("Yamhill County"). In a 1996 election, Petitioner and Respondent Norm Hand ("Sheriff Hand") ran against each other for the position of Yamhill County Sheriff. Mr. Hand won and took office in January 1997. (CR 36, Ex. 3 at ¶1; CR 46, Ex. O at ¶13)

Before the election, the Yamhill County Sheriff's Office was organized such that there were three captains (Field Operations Captain, Support Services Captain, and Adult Corrections Facility Captain) and two administrative sergeants. Petitioner was Support Services Captain and Larry Hailey, who had supported Petitioner during the election, was the Field Operations Captain. Sheriff Hand wanted to restructure the Sheriff's Office because he believed it was top heavy. Sheriff Hand decided to eliminate the positions of Support Services Captain and Field Operations Captain and distribute their duties between the Sheriff, Administrative Sergeant, Patrol Sergeants, and the newly created position of Undersheriff. Sheriff Hand did not eliminate the two Captains' positions because they were held by Petitioner and Mr. Hailey; Sheriff Hand would have eliminated the positions as part of the restructuring regardless of who held them. Sheriff Hand also did not eliminate the positions in order to discipline Petitioner or Mr. Hailey, as Sheriff Hand had no reason to discipline either of them. (CR 36, Ex. 3 at ¶¶2, 5-6, 11-12; CR 46, Ex. A at ¶3; Ex. O at ¶2 and attached Ex. 1)

In February 1997, Sheriff Hand verbally advised Petitioner and Mr. Hailey that Sheriff Hand was restructuring

the Sheriff's Office and eliminating their positions. Sheriff Hand told both men they could apply for the new position of Undersheriff. Sheriff Hand confirmed in writing that the Captains' positions would be eliminated effective March 31. On March 21, Sheriff Hand notified Petitioner and Mr. Hailey that Sheriff Hand was seeking approval from the Board of Commissioners to create two new certified corrections officer positions to begin April 1, and that if Sheriff Hand got that approval, he would offer the positions to Petitioner and Mr. Hailey.[1] After obtaining approval for the positions, Sheriff Hand offered them to Petitioner and Mr. Hailey, and both accepted. (CR 36, Ex. 1 at 17-18; Ex. 3 at ¶¶7-10 and attached Exs. E-J; CR 46, Ex. A at ¶11; Tran. at 73-74, 175, 189)

Before the effective date of the reorganization, Petitioner's attorney sent a letter to Yamhill County stating that elimination of Petitioner's position would violate his civil rights. Petitioner's attorney stated that County personnel policies had conveyed a property interest in Petitioner's position, and requested that Petitioner be placed on administrative leave while the Commissioners investigated whether Petitioner's constitutional rights were being violated. The Board did not place Petitioner on leave. Instead, the Yamhill County budget committee unanimously approved a new budget that included authorization for the position of Undersheriff and did not include the two Captains' positions. (CR 36, Ex. 1 at 19,

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[1] Petitioner states that Sheriff Hand offered Petitioner a clerical position. (Petition at 5) Petitioner's own Affidavit stated that the offer was from the County after county counsel began negotiating with Petitioner. (CR 46, Ex. O at ¶27)

27-29, 37-38, and Ex. 3 at ¶9)[2] As Support Services Captain, Petitioner was responsible for developing and implementing a Sheriff's Office policy manual. He supervised 24 people and had authority to discipline anyone, including sergeants. Petitioner met regularly with the Sheriff and other captains to discuss management and policy issues, and was involved in budget preparation. Petitioner appeared before the Board of Commissioners on many matters and acted for the Sheriff at some Board meetings. Petitioner was responsible for grant administration and procurement and he represented the Sheriff's Office in labor grievances. The only higher-ranking position was the Sheriff. (CR 36, Ex. 1 at 3-16; Ex. 3 at ¶¶2, 4 and attached Exs. A, B, D; CR 46, Ex. A at 2, 14, 15)

In 1988, the Yamhill County Board of Commissioners adopted Board Order 88-96, a discipline policy that superseded all other discipline policies. In July 1989, the County adopted a Handbook that supplemented Board policies. Sheriff Hand was not required to, and did not agree to, be bound by County personnel policies. Other than collective bargaining agreements, there were no other discipline policies in effect when Sheriff Hand took office. Captains were not members of any collective bargaining unit. (CR 36, Ex. 2 at 2-3 and attached Ex. 2; CR 36, Ex. 3 at ¶¶2, 14; Ex. 4 at ¶¶2-6 and attached Exs. A-C)

Petitioner filed this action alleging that he was discharged without Due Process and in violation of both his First Amendment rights and an alleged employment contract with Yamhill County. (CR 1, 40) The District Court

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[2] Although Petitioner became a corrections deputy on April 1, he was on medical leave at that time. Petitioner began working in corrections on April 15. (Tran. at 79)

granted Respondents' motions for summary judgment on the Due Process and breach-of-contract claims, and on that part of Petitioner's First Amendment claim involving Sheriff Hand's decision to reorganize the Sheriff's Office and eliminate Petitioner's position. The Court ruled that there were issues of fact on that part of Petitioner's First Amendment claim alleging that, after he became a corrections sergeant, he was denied promotional opportunities in violation of his First Amendment rights. (Petition App. at 12a-27a) The promotions claim was tried to a jury, which returned a verdict for Respondents. (CR 99; Tran. at 427-28) The District Court then entered a Judgment dismissing Petitioner's claims. (Petition App. at 30a-31a)

In an unpublished disposition, the Ninth Circuit affirmed the District Court's judgment. (Petition App. at 1a-9a) On the First Amendment claim, the Court focused on the nature of Petitioner's responsibilities as Support Services Captain and held that "[a]s a matter of law, the district court did not err in holding that the undisputed duties exercised by [Petitioner] made him a 'policymaker.' " (Petition App. at 3a, 5a) The Court also stated that the rules from *Elrod-Branti* apply to claims involving "political loyalty" just as they do to claims involving "political affiliation." (Petition App. at 3a, n. 3)

REASONS FOR DENYING THE WRIT

Petitioner failed to present any compelling reason for granting his Petition for Writ of *Certiorari*. The issues presented by the Petition involve whether Sheriff Hand and Yamhill County violated Petitioner's First Amendment rights when, after he was elected, Sheriff Hand

reorganized the Sheriff's Office and eliminated certain policymaking positions. There was no First Amendment violation. Instead, the Ninth Circuit's decision simply followed precedent recognizing that elected officials must be permitted to determine how their own offices will be organized and to select individuals for high-level policymaking and policy-implementing roles who share the goals and views of the elected official.

I.

The Ninth Circuit's ruling was correct and is consistent with the rulings by other Circuit Courts that have correctly applied the *Elrod-Branti* exception.

Petitioner contends that this Court should grant his Petition because the Circuit Courts are divided as to whether the *Elrod-Branti* exception applies to claims such as his and that there is a conflict in how the *Elrod-Branti* exception should be applied. (Petition at 12). When the facts of the cases are considered, there is no confusion and there is not a split among the circuits.

A. The Ninth Circuit's decision correctly applied this Court's precedent.

This Court has established general rules for examining a public employee's claim for violation of his First Amendment rights arising out of discipline or discharge by the public employer. In most circumstances, such claims are evaluated using the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Under that test, a court first determines whether the employee's speech involves a matter of public concern. *Id.* at 568. If it does, the court then balances the "interests of the [employee], as a citizen, in commenting upon

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* A public employee's First Amendment rights are not violated where the interests of the government as an employer outweigh the interests of the employee. *Id.* at 573; *accord Connick v. Myers,* 461 U.S. 138, 151-52 (1983).

However, for certain "policymaking" public employees, the employee may be discharged for political reasons without violating the First Amendment. *Branti v. Finkel,* 445 U.S. 507, 517 (1980); *Elrod v. Burns,* 427 U.S. 347, 367-68 (1976) (plurality). An employee for whom the employer can "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" can be discharged for his political position without violating the First Amendment. *Branti,* 445 U.S. at 518.

In this case, assuming that Petitioner could somehow establish that Sheriff Hand's decision to reorganize the Sheriff's Office and eliminate certain policymaking positions was based on the fact that Petitioner had run for election against Sheriff Hand, Respondents established that political considerations are appropriate requirements for effective performance of the position of Support Services Captain. Petitioner's own deposition (CR 36, Ex. 1) demonstrated that he was responsible for several discretionary and policymaking functions, which are the very types of functions for which the Sheriff is entitled to demand loyalty to his views. Petitioner was responsible for developing and implementing a Sheriff's Office policy manual. He met regularly with the Sheriff and other captains to discuss management and policy issues, and he was involved in budget preparation. Petitioner appeared

before the Board of Commissioners on many matters and acted for the Sheriff at some Board meetings. Petitioner supervised 24 people and had authority to discipline anyone, including sergeants. He also represented the Sheriff's Office at labor grievances. Thus, Petitioner had a variety of high-level functions within the Sheriff's Office that involved both making and implementing policy. Under those facts, the Ninth Circuit correctly affirmed the District Court's ruling that the position of Support Services Captain was the type of position for which Sheriff Hand could make hiring decisions involving political loyalty without violating Petitioner's First Amendment rights.

B. The Ninth Circuit's decision is consistent with prior Ninth Circuit precedent and with case law from other Circuits law applying the *Elrod-Branti* exception.

In resolving this case, the Ninth Circuit applied its own precedent addressing the policymaker issue. *See* Petition App-4a, discussing *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). In *Fazio*, the Court allowed to stand the dismissal of an assistant District Attorney who was discharged after campaigning against the current District Attorney. The Ninth Circuit discussed the analysis for determining what roles fit within the *Elrod* and *Branti* exception:

> Under the rationale in *Branti*, a public employee need not literally *make* policy in order to fit within the *Elrod* policymaker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that political considerations are

> "appropriate requirement[s] for the effective performance" of the job.

125 F.3d at 1332 (emphasis in original), *quoting Branti*, 445 U.S. at 518. The Court further explained that

> [a] public agency would be unmanageable if its head had to . . . retain his political enemies . . . in positions of confidence or positions in which they would be . . . exercising discretion in the implementation of policy.

Fazio, 125 F.3d at 1333, *quoting Wilbur v. Mahan*, 3 F.3d 214, 217 (7th Cir. 1993). Finally, the Ninth Circuit identified some factors to be considered in determining whether the employee's role fits within the exception:

> vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.

Id. at 1334, n. 5.

Application of the *Fazio* factors to the position of Support Services Captain demonstrates that the Ninth Circuit correctly affirmed the District Court's application of the *Elrod-Branti* exception. Petitioner had very broad responsibilities that encompassed developing and enforcing policy. He had power to control others in that he supervised 24 people and had authority to discipline them. He had authority to speak in the name of the Sheriff at Board meetings and at union grievances. His position as Captain was viewed by the public as a high-level position, and he had significant influence on programs and grant applications for the Sheriff's Office. He routinely had contact with the Sheriff and the Board, and worked with other Captains in developing policy for the Sheriff's Office.

Like the Ninth Circuit, other Circuits have concluded that the *Elrod-Branti* exception applies not only to the relationships between sheriffs and captains, but even to the relationships between sheriffs and certain types of deputies. In *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the new sheriff refused to reappoint existing deputy sheriffs, clerks, jailers, or process servers. Although the Eleventh Circuit did not agree that all of the positions fit within the *Elrod-Branti* exception, the Court did hold that "loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff." 866 F.2d at 377. The Court described the deputies in *Terry* as the "alter ego" of the sheriff and reasoned that the "closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Id.*; *accord Cutcliffe v. Cochran*, 117 F.3d 1353, *reh'g denied*, 128 F.3d 1465 (11th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998).

The Seventh Circuit has reached similar conclusions. In *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir.), *cert. denied*, 510 U.S. 861 (1993), and *Upton v. Thompson*, 930 F.2d 1209, 1282, *reh'g denied*, 938 F.2d 84 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the Seventh Circuit held that political affiliation is an appropriate requirement for a deputy sheriff because a sheriff's political fortunes are closely tied to the job performance of his deputies. That Court has recognized that deputies "operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Dimmig*, 983 F.2d at 87.

Similarly, the Fourth Circuit, sitting *en banc* in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522

U.S. 1090 (1998), stated that "the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable." 119 F.3d at 1164. The *en banc* Court held that the *Elrod-Branti* exception applied to deputies who campaigned for the sheriff's opponents and that those deputies "had no constitutional right to continued employment after the election." *Id.* The court added:

> We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign for the candidate's opponent. That is the exact measure employed by Sheriff Medford in this case. The deputies admit that they campaigned on behalf of Medford's opponents. "It was never contemplated that . . . sheriffs . . . must perform the powers and duties vested in them through deputies or assistants selected by someone else," and we do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.

Id. at 1164-65 (footnotes omitted); *accord Joyner v. Lancaster*, 815 F.2d 20, 22-24 (4th Cir. 1987), *cert. denied*, 484 U.S. 830 (1987) (captain who helped with departmental planning and supervised deputies was implementing sheriff's policies and could be discharged for campaigning for sheriff's opponent).

C. Decisions within the Ninth Circuit are not inconsistent in the application of the *Elrod-Branti* exception.

Petitioner contends that decisions within the Ninth Circuit on the applicability of the *Elrod-Branti* exception are "seriously divided." He relies on *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir.), *cert. denied*, 502 U.S. 818 (1991); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990), and *Fazio, supra*, to support that argument. (Petition at 14-15) Those cases are not inconsistent.

As discussed above, in *Fazio*, the Ninth Circuit upheld the dismissal of an assistant district attorney on the ground that his position was a policymaking one. The Ninth Circuit reaffirmed the importance of allowing the head of a public agency to run his or her department by placing persons loyal to the agency head's views into positions involving the exercise of discretion and the implementation of policy. 125 F.3d at 1333.

In *Finkelstein*, a District Attorney suspended the plaintiff, a deputy district attorney, for unlawfully accessing confidential personnel files to obtain information about a second deputy district attorney against whom the plaintiff was running for office. When the confidential information leaked, the District Attorney assumed that the plaintiff was responsible and suspended him without an opportunity to deny the charges. The Ninth Circuit held that the District Attorney was entitled to qualified immunity because it was not clearly established that the plaintiff was protected from disciplinary action based on his candidacy. 924 F.2d at 1453. This Court too has recognized that the position of a district attorney might be different than that of a public defender. *Branti*, 445 U.S. at 519 n. 13.

Contrary to Petitioner's argument, the Ninth Circuit's decision in *Thomas v. Carpenter, supra,* is not inconsistent with *Fazio* or *Finkelstein*. In *Thomas,* the plaintiff, a lieutenant in the sheriff's department, was relieved of certain duties after he unsuccessfully ran for election against the sheriff. The district court granted a motion to dismiss the complaint based on the *Elrod-Branti* exception. The Ninth Circuit reversed. However, it is important to focus on the stage of the proceedings and the nature of the position involved. The Ninth Circuit was reviewing a ruling on a motion to dismiss. The Court held *only* that the sheriff could not show, based *solely* on the allegations of the plaintiff's complaint, that political loyalty was "essential to the effective performance of the tasks removed from his list of responsibilities." 881 F.2d at 832. The plaintiff had alleged that he was not responsible for developing departmental policy. It was under those circumstances that the Court addressed the *Pickering* balancing test. However, the Ninth Circuit also stated that the defendant might be able to prove at trial or through summary judgment that political loyalty was needed for the effective implementation of departmental policy for each of the positions held by the various plaintiffs. *Id.* Thus, *Thomas* addressed *only* the question whether the plaintiff had stated a claim. Nothing in *Thomas* is inconsistent with *Finkelstein* or *Fazio,* and nothing in any of those decisions mandates that Petitioner's claim should have been analyzed under *Pickering*.[3]

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[3] Petitioner also relies on a district court decision, *Meek v. County of Riverside,* 982 F. Supp. 1410 (C.D. Cal. 1997), *aff'd in part, dismissed in part,* 183 F.3d 962 (9th Cir.), *cert. denied,* 120 S. Ct. 499 (1999). Like *Thomas, Meek* involved a ruling on a motion to dismiss. For jurisdictional reasons, the Ninth Circuit did not address on appeal the propriety of the District Court's

D. Decisions from the Fourth Circuit do not demonstrate a division within that Circuit on the application of the *Elrod-Branti* exception.

Petitioner contends that a series of decisions in the Fourth Circuit demonstrate the lack of clarity in this Court's rulings on the application of the *Elrod-Branti* exception to the *Pickering* balancing test. Petitioner relies on *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), *Joyner v. Lancaster, supra*; and *Jenkins v. Medford, supra*. (Petition at 14)

In *Jones v. Dodson*, the Fourth Circuit employed the *Pickering* balancing test after making a sweeping statement that the Court did not believe the duties of deputy sheriffs, "no matter what the size of the office, or the specific position of power involved" could ever be found to involve policymaking related to partisan political interests or to involve access to confidential information involving partisan political concerns. 727 F.2d 1329. Three years later, the Fourth Circuit again evaluated a discharged employee's First Amendment claim under the *Pickering* balancing test, and did not address the effect of this Court's decisions in *Elrod* and *Branti*. *See Joyner v. Lancaster*, 815 F.2d at 22-23. Thereafter, in *Jenkins v. Medford*, the Fourth Circuit, sitting *en banc*, applied the *Elrod-Branti* analysis and upheld the dismissal of a deputy sheriff who performed policymaking functions and who had run for office against the elected sheriff. *Jenkins*, 119 F.3d at 1164. In doing so, the Court focused on the specific roles of the sheriff and his deputies, noting the important policymaking and policy implementation functions of the deputies at issue. *Id.* at 1163-64. The *en banc* Fourth

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analysis. Absent Ninth Circuit review, the District Court's decision in *Meek* does not establish a conflict that this Court should address.

Circuit also addressed both *Jones* and *Joyner*. With respect to *Jones*, the *en banc* Court rejected the broad statement that deputy sheriffs never can be policymakers and, instead, required district courts to examine the specific position at issue to determine whether the role fits within the *Elrod-Branti* exception. *Id.* at 1164. As to *Joyner*, the Court stated that the reason the court had focused on *Pickering* was because the case addressed a deputy whose activities had indeed caused disruption in the workplace. *Id.* at 1161.

The decision in *Jenkins* does not reflect a split within the Fourth Circuit. Instead, *Jenkins* is the end result of the progressive development of the law, culminating in the recognition that the *Elrod-Branti* analysis should be applied to deputy sheriffs who occupy policymaking and important policy implementation roles. In such cases, loyalty to the positions held by the elected official are indeed important requirements for the effective performance of the public office involved. *Jenkins*, 119 F.3d at 1164.

E. The decisions from other Circuits do not demonstrate confusion that justifies granting the Petition.

Petitioner contends that other Circuits have struggled with the application of *Elrod-Branti* to cases involving issues similar to those in this case. Petitioner relies on *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Upton v. Thompson*, *supra; Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988); and *Terry v. Cook*, *supra*. (Petition at 16) When the facts of those cases are considered, it is clear that they are not inconsistent.

In *Burns v. County of Cambria*, the Third Circuit addressed the applicability of the *Elrod-Branti* exception

to deputy sheriffs whose duties were limited to three tasks: serving process; transporting prisoners to and from court, and providing courtroom security. 971 F.2d at 1022. The Court concluded that the defendants failed to demonstrate how political alignment between the sheriff and deputies is relevant to the performance of such limited duties. *Id.* In doing so, the Third Circuit distinguished the nature of the duties involved in *Burns* from those in cases in which the Court had recognized a right to demand political loyalty. *Id.* at 1023.[4]

A similar analysis was applied in the Tenth Circuit. In *Dickeson v. Quarberg, supra*, the Tenth Circuit concluded that the head jailer and an administrative assistant, neither of whom were sworn deputies, could not be discharged by a newly-elected sheriff merely because they had supported the sheriff's opponent during the election. 844 F.2d at 1443-44. The nature of the duties of both employees explain that outcome. As the head jailer, one of the plaintiffs prepared work schedules, ordered food, planned menus, prepared meals, and supervised four jailers in housing and feeding prisoners. For the other plaintiff, an administrative assistant, ninety percent of her duties were secretarial and, although her work caused her to come across some confidential papers, the Court concluded that her role was such that political loyalty was not an appropriate requirement for the job.

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[4] *Citing Brown v. Trench*, 787 F.2d 167, 170 (3rd Cir. 1986) (elected county commissioners could require shared political beliefs from assistant director of public information whose duties included writing press releases and acting as a spokesperson for commissioners); *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981) (mayor had a right to complete cooperation and loyalty from city solicitors who performed functions "intimately related to city policy").

844 F.2d at 1443 and n. 7; *accord Terry v. Cook*, 866 F.2d at 377-78.

On the other side are *Upton v. Thompson*, *supra*, and *Terry v. Cook*, *supra*. In *Upton*, the Tenth Circuit held that political considerations were appropriate for employment decisions involving deputy sheriffs because of the autonomy and discretionary authority exercised by deputies. 930 F.2d at 1218. The Court noted that the deputies at issue were "vested with substantial discretionary authority in the implementation of the policy goals" of the elected sheriff, which made them suitable for treatment similar to that of an assistant prosecutor or deputy city commissioner. *Id.* at 1215.

The Eleventh Circuit also has recognized the appropriateness of political considerations in connection with deputy sheriffs who have policymaking and discretionary authority. As discussed above, in *Terry v. Cook*, *supra*, the Eleventh Circuit affirmed the dismissal of claims by deputy sheriffs but not other employees, all of whom alleged that they were discharged for political reasons. 866 F.2d at 377. The newly-elected sheriff, who had campaigned on a platform that promised a change in administration and to replace all employees, refused to reappoint deputy sheriffs, clerks, investigators, dispatchers, jailers, and process servers. *Id.* at 374. The Eleventh Circuit upheld the refusal to reappoint the deputy sheriffs because, unlike the other employees, the deputies had to perform the powers and duties of the sheriff. The Court concluded that, under those circumstances, closeness and cooperation were absolutely necessary and the sheriff must retain absolute authority over the deputies' appointments. *Id.* at 377.

Thus, the Circuit Courts have recognized that the applicability of the *Elrod-Branti* exception depends on the

circumstances of each case. In this matter, the role of Support Services Captain involved a much higher level of responsibility, discretionary authority, and policymaking functions than the roles in *Burns* and *Dickeson*. Instead, the duties make this case fall into the categories recognized in *Upton* and *Terry*. Although Petitioner challenges the lower courts' focus on the specific nature of his role as Support Services Captain, both courts properly considered whether the duties to be performed made Petitioner's loyalty to Sheriff Hand's goals and views a proper consideration in Petitioner's employment.

F. Plaintiff cannot establish a split among the circuits that justifies granting *certiorari* in this case by relying on a Fifth Circuit decision that erroneously applied this Court's First Amendment decisions.

Petitioner contends that the Fifth Circuit's decision in *McBee v. Jim Hogg County, Tex.*, 703 F.2d 834 (5th Cir. 1983), *on reh'g*, 730 F.2d 1009 (5th Cir. 1984) (*en banc*), demonstrates a conflict among the Circuits. (Petition at 15) However, that decision is based on an erroneous construction of this Court's decision in *Connick*. The fact that another Circuit errs in its application of this Court's decisions should not be a basis for reviewing this case.

In *McBee*, the newly-elected sheriff declined to reappoint some of his predecessor's employees, including five deputy sheriffs. After ruling that the *Elrod-Branti* exception applies equally to claims based on personal support for a candidate as they do to claims based on party affiliation, the district court concluded that there was no showing that political loyalty was an appropriate qualification for the position of deputy sheriff. 730 F.2d at 1010. A panel of the Fifth Circuit reversed, holding that the *Elrod-Branti* exception applied because of the "close

working relations and mutual confidence demanded by service in a small county office." *Id.* at 1011. The *en banc* Fifth Circuit vacated the panel's decision, ruling that, under the then-recent decision in *Connick v. Meyers*, the issue must be decided under *Pickering*, not *Elrod* and *Branti*. *McBee*, 730 F.2d at 1013. In doing so, the *en banc* Court misapplied this Court's decision in *Connick*.

In *Connick*, this Court addressed the claim of an assistant district attorney who was discharged after circulating a questionnaire raising issues about internal office policy and whether other assistants felt pressured to work in political campaigns. The questionnaire came on the heels of the plaintiff's challenge to a decision by her superiors to transfer her to another part of the office. Nothing in that case involved political loyalty to political affiliation. 461 U.S. at 141. Therefore, this Court resolved the plaintiff's claim under the *Pickering* analysis. *Id.* at 146-48. In doing so, this Court did not invalidate *Elrod* or *Branti*, and did not limit their holdings in cases that do involve political loyalty or political affiliation. This Court did not apply *Elrod* and *Branti* because the facts in *Connick* did not call for such an application.

In *McBee*, without explaining why it believed *Elrod* and *Branti* are no longer applicable to claims that do involve the political loyalty or affiliation, the Fifth Circuit concluded that, under *Connick*, the Court was constrained to apply the *Pickering* balancing test to claims addressing political loyalty. *McBee*, 730 F.2d at 1013. However, nothing in *Connick* supports the conclusion that the analysis from *Elrod* and *Branti* is no longer applicable in an appropriate case. The Fifth Circuit's error in that regard is not a basis for granting *certiorari* in this case in which the Ninth Circuit correctly applied First Amendment law.

II.

Petitioner failed to preserve his contention that the *Elrod-Branti* exception does not apply because his claim was not based solely on political affiliation.

Petitioner contends that "most significantly" the Ninth Circuit's ruling was wrong because, under this Court's decision in *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), the *Elrod-Branti* exception does not apply to his First Amendment claim because that claim is not based "solely upon political affiliation." (Petition at 16-17) However, Petitioner's argument in that regard was made far too late in this case to be a proper basis for granting his Petition.

In addressing his claims against Sheriff Hand in the District Court, Petitioner contended that there were two reasons why the *Elrod-Branti* exception did not apply: (1) the *Elrod-Branti* exception applies only to at-will employees and Petitioner was not an at-will employee; and (2) the *Elrod-Branti* exception is available only to hiring officials "with discretion to appoint individuals to employment" and Sheriff Hand was not the hiring authority. (CR 45 at 4-9) Although Petitioner expanded those two arguments (CR 45 at 5-9), he never argued that the *Elrod-Branti* exception did not apply because his claim involved more than political affiliation. As to his First Amendment claim against Yamhill County, Petitioner argued that (1) Yamhill County failed to demonstrate that Petitioner's candidacy for Sheriff "caused any disruption to the efficient operation of Yamhill County's workplace," and (2) the *Elrod-Branti* exception does not apply because Petitioner was not an at-will employee. (CR 45 at 10)

In his opening brief in the Ninth Circuit, Petitioner made the same arguments in challenging the District Court's determination that Respondents were entitled to summary judgment under the *Elrod-Branti* analysis:

> There are two reasons that the court's analysis of the law is wrong. First, the *Elrod-Branti* exception applies only to "at will" employees and Mr. May was not an at will employee. Second, the *Elrod-Branti* exception is applicable only when "the hiring authority" demonstrates that political considerations are "appropriate requirements for the effective performance of the public office involved." [*Fazio*, 125 F.3d at 1333.]. In a County where patronage historically has not been used, where elected administrators have no discretionary authority to hire, where the hiring authority expressly authorizes its employees to engage in political activity, and where there is no impact on the performance of the public office involved, the *Elrod-Branti* exception simply does not apply.

(Opening Brief at 42) Again, Petitioner then explained those arguments in detail, but never argued that the *Elrod-Branti* exception did not apply because his claim involved more than political affiliation. (Opening Brief at 44-49) Nowhere did Petitioner cite *O'Hare Truck Service* or even come close to making the argument on which he now relies – that the *Elrod-Branti* exception does not apply because Petitioner's First Amendment claims were not based "solely on political affiliation." Instead, Petitioner raised that issue for the first time in his Reply Brief in the Ninth Circuit. (Reply Brief at 17-22) Because Petitioner never raised the issue in the District Court, and did not even raise it on appeal until his Reply Brief, this Court should refuse to consider the issue. *See California v. Taylor*, 353 U.S. 553, 556 n. 2 (1957).

III.

In any event, the Ninth Circuit's decision correctly applied the law and does not raise any new issues concerning First Amendment rights.

A. This Court's decision in *O'Hare* does not require a different result.

Petitioner contends that the *Elrod-Branti* exception does not apply because his claim involves something more than political affiliation. His argument is based on his construction of this Court's decision in *O'Hare Truck Service, supra.* (Petition at 16-18) Even if this Court considers that argument in light of the fact that it was not preserved, Petitioner is wrong on the merits. Petitioner's claim was one for political affiliation or political loyalty.[5] Petitioner has always contended that Sheriff Hand eliminated Petitioner's position because he ran against Sheriff Hand in the election and debated him on issues involving the Sheriff's Office. (CR 40, ¶23; Petition at 18) Nothing in *O'Hare* requires a public employer to keep in a high-level position a public employee with views contrary to that of an elected official who is accountable for making and enforcing policy.

In *O'Hare,* this Court addressed the question whether the political affiliation rules from *Elrod* and *Branti* applied to independent contractors hired by a public body and who are excluded from work for refusing to support a political candidate. 518 U.S. at 715. Although this Court discussed *Elrod* and *Branti,* this Court had no opportunity in *O'Hare* to apply the rules from *Elrod* and *Branti* because the contractor involved there had no relationship with

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[5] As discussed below at page 22, there is no Constitutional basis for distinguishing between political affiliation and political loyalty.

the Mayor akin to the kind of high-level position discussed in *Elrod* and *Branti*. This Court simply did what the Seventh Circuit had refused to do – it extended the rules concerning political affiliation to independent contractors. Nothing in *O'Hare* changes the rule for public employees in a position involving policymaking; communication with the legislative body and the public about policy; representation of the elected official before the legislative body, at union grievances, and elsewhere; and responsibility for policy implementation. In such cases, the interest of the employer in having those positions filled by a person who shares the views of, and is loyal to, the elected official are appropriate in order to fulfill the State's important interest in "promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Branti v. Finkel*, 445 U.S. at 517.

B. There is no Constitutional basis for distinguishing between "political loyalty" and "political affiliation."

Petitioner contends that this case should be treated differently because there is a difference between "political loyalty" and "political affiliation." He relies on the fact that elections for sheriff in Oregon are nonpartisan. (Petition at 3, 11, 13-14) However, Petitioner fails to provide any meaningful reasons for treating the situations differently.

In *Jenkins v. Medford*, the Fourth Circuit applied the *Elrod-Branti* exception to a case involving political loyalty where the contention was that the plaintiff was discharged because he ran against the elected sheriff. The Fourth Circuit recognized that the issues are essentially the same – whether a deputy demonstrates opposition to the Sheriff's positions and actual or potential disloyalty

and whether the Sheriff must attempt to implement his policies through deputies who have expressed clear opposition to him. 119 F.3d at 1164-65. Whether the differences between the elected official and the employee arise because they are members of different political parties or because they share different goals and views on more specific matters concerning the operation of the Sheriff's Office is not relevant to the question of the effect on the State's interest, recognized in *Pickering*, in "promoting the efficiency of the public services it performs through its employees."

Other Courts have reached similar conclusions. In *Dickeson v. Quarberg, supra*, the Tenth Circuit addressed a challenge to dismissals in a case where the Record did not make clear the party affiliations of the Sheriff and his predecessor. The Court concluded that the lack of a clear record was irrelevant because the *Elrod-Branti* rationale applies intraparty as well as interparty. 844 F.2d at 1437 n 2. The Tenth Circuit also stated that the defendant can fall within the *Elrod-Branti* exception by showing that either party affiliation or political association and support are appropriate requirements for effective performance of the public office involved. *Id.* at 1441; *accord Terry v. Cook*, 866 F.2d at 377 ("no practical difference between the lack of loyalty punished by Sheriff Cook in this case and the lack of party affiliation punished by the defendants in *Elrod* and *Branti*."); *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985) (*Elrod-Branti* exception applied even where the issue did not involve allegiance to different parties).

Petitioner contends that the Fifth Circuit has "specifically rejected application of the *Elrod-Branti* analysis to 'political loyalty' claims." Petitioner relies on *McBee v. Jim*

Hogg County, Tex., supra. (Petition at 15) Petitioner misreads that decision. Although, as discussed above at page 17, the Fifth Circuit concluded that the *Elrod-Branti* exception did not apply to the claims at issue in *McBee*, the decision did *not* turn on the fact that the case involved claims based on political loyalty rather than political affiliation.[6] Instead, the Fifth Circuit applied the *Pickering* analysis based on the Fifth Circuit's construction of this Court's decision in *Connick v. Myers, supra. See McBee*, 730 F.2d at 1014.

Nothing about the nature of this Court's decisions concerning discharge or discipline for reasons involving political views or expression is affected by the fact that the race for a particular position is nonpartisan or even that candidates may be from the same political parties. As is clear from the recent Presidential primaries, there is room for substantial divergence of views and positions even within one party. Moreover, even Petitioner agrees that he held positions different than those of Sheriff Hand. (Petition at 18) It is that fact, not simply membership in, or support for, a political party that makes the political nature of the issues important.

C. Petitioner's allegation that he was not an at-will employee is not relevant to his First Amendment claim.

Petitioner erroneously contends that the *Elrod-Branti* exception does not apply because he was not an at-will employee. Petitioner incorrectly argues that his alleged

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[6] In *McBee*, the plaintiff had run against the elected sheriff in a democratic primary. The sheriff won the primary and ran unopposed in the general election. Thus, issues of different party affiliation were not involved. *See* 703 F.2d at 838 n.1.

property interest in his position[7] changes the nature of his First Amendment rights. (Petition at 19) Petitioner simply mixes the analysis of his right to Due Process with the analysis of his rights under the First Amendment. However, the claims are subject to two very different analyses. Even if Petitioner could establish a property interest that would entitle him only to certain Due Process protections,[8] the right to Due Process does not change the nature of his rights under the First Amendment. Instead, this Court has made clear that, in First Amendment cases, it is irrelevant whether the employee has a property interest in the employment. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72, *reh'g denied*, 497

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[7] Although Petitioner argues that he had a property interest in his position as Captain (Petition at 6, 11, 19, 20), and that he was deprived of that property interest without Due Process (Petition at 21), Petitioner did not include in the questions presented any issue concerning whether he had a property interest or was denied Due Process. Instead, Petitioner simply summarily states that he presented evidence that he had a property interest (Petition at 20) and that remand of the Due Process claim is appropriate because the Ninth Circuit based its disposition of that claim on its resolution of the First Amendment claim. (Petition at 21 n. 2) Because Petitioner failed to include questions about whether he had property interest or whether he was denied Due Process, this Court should decline to consider those issues. *See* Sup. Ct. R. 14.1(a).

[8] The Record in this case establishes that, even if Petitioner could establish a property interest in his position as Captain, he received all the process that he was due. Before his position was eliminated, Sheriff Hand gave Petitioner notice that the position was being eliminated. Petitioner had an opportunity to protest the decision and he took advantage of that opportunity – his lawyer had numerous contacts with Yamhill County in which the lawyer set out Petitioner's position and requested that the decision be rescinded. (CR 36, Ex. 1 at 17, 27-29, 37-38; Ex. 3 ¶¶7-9 and attached Ex. F)

U.S. 1050 (1990) (question whether employees had a First Amendment right not to be denied promotions, transfers, or other job-related benefits was unrelated to the question whether they had a property right in their current positions or the benefit they sought).

In any event, even if Petitioner's theory was correct – *i.e.*, that the *Elrod-Branti* exception applies only to at-will employees – the outcome is still the same. Petitioner did not have a property interest in his position as Captain and, therefore, the *Elrod-Branti* analysis applies.

The Fourteenth Amendment protects people against deprivation of a property interest without due process. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Petitioner had a constitutionally protected property interest in his position only if he had a reasonable expectation of continued employment in the sense of a "legitimate claim of entitlement" to his position. It is not sufficient to have a mere need or desire for, or a "unilateral expectation" of, continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A legitimate claim of entitlement arises only where it is created by "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577.

Under Oregon law, absent a contractual or statutory requirement to the contrary, employment is "at-will." Thus, an employee may be discharged without notice, at any time, for any reason, or for no reason at all. *Patton v. J. C. Penney Co.*, 301 Or. 117, 120, 719 P.2d 854 (1986); *Simpson v. Western Graphics*, 293 Or. 96, 99, 643 P.2d 1276 (1982). With respect to the status of a sheriff's deputies and employees in Oregon, under Or. Rev. Stat. § 204.601(2),

> All [deputies and employees of county officers] shall be appointed by such county officer, and

> shall hold office during the pleasure of the appointing officer.

Sheriffs are elected officials. Or. Rev. Stat. § 204.005(1). Moreover, Or. Rev. Stat. § 204.635(1) provides that "[a] sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff." Because, no other statute, contract, or county policy limited Petitioner's at-will status, Petitioner had neither a "legitimate claim of entitlement to his position," nor a constitutionally protected property interest.

Petitioner relied on certain County and former Sheriff's Office Policies as the basis for his claim that he had a property interest in his position as Captain.[9] However, none of those policies applied to override Petitioner's at-will status.

In Oregon, a county may alter the at-will status of a sheriff's employees if the county makes clear its intent to do so. *See Graves v. Arnado*, 307 Or. 358, 364, 768 P.2d 910 (1989).[10] Yamhill County has not done so. Unlike the policies at issue in *Graves*, nothing in Yamhill County Board Order 88-96 indicated an intent to override the

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[9] Because Petitioner does not discuss his Due Process claim, he does not explain the basis for his assertion that he had a property interest in his position. Petitioner based his claim on hearsay statements from other County employees and on three documents: (1) Yamhill County Board Order 88-96; (2) Policy 9 from a Sheriff's Office Policy Manual adopted by Sheriff Hand's Predecessor; and (3) Policy 14 found in a Manual in which a County Personnel Officer maintained all former and current County personnel policies. (*See* Ninth Circuit Opening Brief at 19-25; CR 36, Ex. 4 and attached Exs. A and Ex E. at 4; CR 46, Ex. A and attached Exs. I and K)

[10] *Graves* (a county *may* adopt rules that impose due process conditions on sheriff's statutory authority to discharge).

applicable statutes and make Board Order 88-96 applicable to the sheriff and his employees. Furthermore, Board Order 88-96 simply established procedural requirements for disciplining County employees. Even if Petitioner could establish that he was disciplined, those procedural requirements do not transform a unilateral expectation of continued employment into a protected property interest.[11]

Petitioner also cannot establish a property interest by relying on the Sheriff's Office Policy Manual adopted by Sheriff Hand's predecessor. That policy manual was not binding on Sheriff Hand. *See Graves*, 307 Or. at 364 (sheriff's authority to appoint deputies and employees "may not be limited by a predecessor sheriff's action"); *Board of Klamath Cty. Comm. v. Select Cty. Employees*, 148 Or. App. 48, 53, 939 P.2d 80, *rev. denied*, 326 Or. 57 (1997) (outgoing board cannot enter into contract limiting grounds for incoming board to discharge). Because Sheriff Hand did not agree to be bound by existing policies (CR 36 at ¶10 and Ex. 3 at ¶14), and because Petitioner cannot rely on the policy manual adopted by the former sheriff, Petitioner cannot establish a protected property interest based on that manual.

Finally, Petitioner's at-will status was not modified by Personnel Policy 14 on which he relied. Assuming Petitioner could establish a claim based on a policy

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[11] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[t]he categories of substance and procedure are distinct" and property "cannot be defined by the procedures provided for its deprivation"); *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) ("State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right").

shown only to others, there is no evidence that Policy 14 ever was adopted by the Board and made effective in Yamhill County. Moreover, if it was effective, Policy 14 was superseded when the County adopted Board Order 88-96. Finally, by its own terms Policy 14 applied to union members. Because Plaintiff was not a member of any union, Policy 14 does not apply to him. (CR 36, Ex. 2 at 2-3, 7; Ex. 4 ¶¶3-5; CR 46, Ex. I at 1-20) Neither Policy 14, nor any of the other policies on which Petitioner relied, gave him a property interest in his position.

D. The fact that the Board of Commissioners approved Sheriff Hand's decision does not preclude application of the *Elrod-Branti* exception.

Petitioner contends that Sheriff Hand was not the hiring authority and, therefore, the *Elrod-Branti* exception does not apply. (Petition at 6, 11-12, 19-20) Petitioner is wrong. Under Oregon law, the Board of Commissioners determines the number of employees, including deputies, and their salaries. Or. Rev. Stat. § 204.601(1). However, the employees are chosen by the sheriff. Or. Rev. Stat. §§ 204.601(2); 204.635(1). Thus, the Board had to authorize the positions, such as Captain, and determine their salaries. However, appointments to those positions were made by the former Sheriff. After Sheriff Hand was elected, Yamhill County both approved his plan to reorganize the Sheriff's Office by approving the position of Undersheriff rather than the two Captains' positions, and also approved of the creation of the two positions to which Petitioner and Mr. Hailey eventually were appointed. (CR 36, Ex. 3 at ¶9-10) The ultimate decision of who to place in those positions was made by Sheriff Hand.

Moreover, even if Board approval of Sheriff Hand's decisions meant that Sheriff Hand did not have authority

to reorganize the Sheriff's Office, that would not change the outcome here. The *Elrod-Branti* exception would be meaningless if it did not apply to both the individual public official and the public body. *See Fazio v. City and County of San Francisco, supra* (*Elrod-Branti* exception precluded liability for both the District Attorney and the public body).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX A

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Or. Rev. Stat. § 204.005 (1999) provides, in relevant part:

> There shall be elected at the general election, by the electors of each county, the following county officers:
>
> (1) A sheriff.

Or. Rev. Stat. § 204.601 (1999) provides:

> (1) The county court or board of county commissioners of each county shall fix the number of deputies and employees of county officers whose compensation is to be paid from county funds.
>
> (2) All such deputies and employees shall be appointed by such county officer, and shall hold office during the pleasure of the appointing officer.

Or. Rev. Stat. § 204.635 (1999) provides, in relevant part:

> (1) A sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff. The sheriff of any county may appoint deputies in the county for the purpose only, and with authority only, to receive and serve summons and civil process in any suit or action. A certified copy of the appointment of a deputy sheriff shall be filed with the county clerk, and the person appointed shall, before

entering upon the duties of the office, take and file with the county clerk the oath of office.

. . . .

(3) A deputy has the power to perform any act or duty that the principal has, and a person specially appointed to do a particular act has the same power in relation to the particular act authorized. The principal is responsible for the conduct of such deputy or person specially appointed except as provided in subsection (4) of this section.

(4) In counties having a civil service system covering deputy sheriffs, the sheriff shall not be responsible for the conduct of deputy sheriffs or persons specially appointed as provided in subsection (2) of this section.